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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 28, 2004

Case Number: TSO-0157

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter the individual) to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that the individual has met his burden to bring forward sufficient evidence to show that his access authorization should be restored.

I. History

This administrative review proceeding began with the issuance of a Notification Letter, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a detailed statement of the derogatory information.

Specifically, the Notification Letter indicated that a DOE consultant psychiatrist (hereinafter also referred to as consultant psychiatrist) diagnosed the individual as suffering from major depressive disorder, recurrent, and borderline personality traits. According to the Letter, the DOE consultant psychiatrist found that these disorders have caused significant defects in the

¹/ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

individual's judgment or reliability in the past and that they are likely to do so in the future, particularly during periods of stress. The Letter stated that this information creates a security concern under 10 C.F.R. § 710.8(h) (Criterion H). ² In this regard, the Letter also cited the fact that in January 2003, the individual "attempted suicide by 'drinking himself to death,'" and voluntarily admitted himself into a psychiatric hospital where he stayed for four to five days. The Letter also noted that the individual was voluntarily hospitalized for depression for about one week in April 1987. Finally, the Letter noted that in November 2002 the individual was arrested for battery of a household member, and for resisting arrest. The Notification Letter stated that this incident raises a security concern under 10 C.F.R. § 710.8(l) (Criterion L). ³

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that Letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of his treating psychologist (individual's psychologist), a psychiatrist who evaluated him for the purposes of this administrative proceeding (individual's psychiatrist); his brother and two friends. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

2/ Criterion H relates to a mental condition which, in the opinion of a psychiatrist causes or may cause a significant defect in judgment or reliability.

3/ Criterion L relates to unusual conduct or circumstances showing that an individual is not honest, reliable or trustworthy.

II. Hearing Testimony

I will first describe the initial testimony of the DOE consultant psychiatrist, which was based on his September 2003 evaluation. Next, I will discuss the testimony of the individual's two experts: his psychiatrist and his psychologist. Thereafter, I will describe the testimony of the individual and his colleagues and friends. The testimony of the individual's witnesses updated and completed the information in this case, thereby offering some new perspectives on the conclusions about the individual that the DOE consultant psychiatrist reached in September 2003. I will then set forth the DOE consultant psychiatrist's updated views, based on the new information provided by the other witnesses.

A. The Three Expert Witnesses: DOE Consultant Psychiatrist [first round]; Individual's Psychiatrist; Individual's Psychologist

1. Consultant Psychiatrist

In the first portion of his testimony, the DOE consultant psychiatrist reiterated the diagnosis that he reached in his original evaluation. That evaluation took place about 17 months prior to the hearing. This diagnosis was that the individual had suffered several serious episodes of depression. He pointed out the stressful episodes in the individual's life that led him to attempt suicide and be unable to perform at work.

In particular, the consultant psychiatrist noted the November 2002 episode involving the "battery of a household member" cited in the Notification Letter. In that episode, the individual had a physical altercation with his long-term girlfriend. The police were called. The individual at first resisted arrest, and then he was arrested.⁴ The altercation led to the break-up with the girlfriend. The individual was permanently removed from his residence, sole possession of which was given to his girlfriend. After this incident the individual became depressed, sought counseling, and then in January 2003, attempted suicide. Tr. at 22-23. See also, Consultant Psychiatrist's Evaluation at 4-6.

4/ The charges were dismissed.

The consultant psychiatrist indicated that the individual had some borderline personality traits, but did not think that the individual had full blown borderline personality disorder. He stated that as of the time of the evaluation, he assessed the individual's global functioning level as 55-- moderately impaired. Tr. at 13-34.

2. Individual's Psychiatrist

The individual's psychiatrist spent eight clinical hours over several months with the individual. He found the individual suffered from moderate depression, which is now in partial remission. He characterized the depression as not very severe and "mostly gone away." Tr. at 62. He stated that the level of control of the depression "is not tenuous, it's solid." Tr. at 76. He noted that the individual has been under considerable stress for several years in his professional and private life. However, he believed that the individual has accepted responsibility for his actions in 2002 involving the altercation with his girlfriend. He believes that through therapy, the individual has learned coping skills and the ability to form the kind of life he is seeking. It was his view that in the future, there is only a "very, very minimal" chance of a depressive episode as severe as the suicidal episode. With respect to the individual's experiencing depressive symptoms in the future, he thought the chance was a "coin toss." Tr. at 77. However, this witness testified that since the individual is ready and willing to seek treatment, the likelihood of interference with his judgment "very minimal." *Id.* He further testified that "with a reasonable degree of medical certainty" the individual does not have a judgment or reliability problem. Tr. at 65. See generally Tr. at 61-78.

He did not find borderline personality disorder in the individual. The individual's psychiatrist testified that even if the individual exhibited some traits that are associated with this disease, it "doesn't mean you have the diagnosis." Tr. at 69. It was his view that while, at the time of the consultant psychiatrist's evaluation, it may have appeared that the individual had borderline personality traits, with the passage of 17 months since the evaluation we now have a clearer picture of the individual, and those traits do not represent borderline personality disorder in

this individual. According to the individual's psychiatrist, over the last 17 months, the traits have not reappeared. He believed that if the traits were associated with the disorder in this individual, the traits and associated behaviors would have continued to reappear over this time period. Tr. at 69-76.

3. Individual's Psychologist

The individual's psychologist indicated that she has been treating the individual since December 2002. She stated that she is currently seeing him every other week, and that until about four months before the hearing she saw him weekly. She stated that he is very conscientious about keeping his appointments, and that she thought this was significant because patients suffering from borderline personality disorder often display erratic behavior and miss appointments. She described the issues that she was working on with the individual in their therapy sessions. These include stress management, and the end of his relationship with his long-term girlfriend. She believes that he is very serious about his therapy and she continues to see steady improvement. She further believes that he has taken responsibility and control of his life and there is no likelihood of more violence. She indicated that the individual has more coping skills now than he did at the time of the incident with his former girlfriend. She testified that his depression is in remission and he is now functioning well. She assessed his global functioning level as "very high," "85-90." Tr. at 89-104.

She did not believe that the individual suffered from borderline personality disorder. She believes that he may have exhibited some borderline behaviors, but that these were a "state," not "traits," which she testified are more enduring. She related the traits he did display to his depression and to the serious trauma that he experienced in the break up with his girlfriend, not to borderline personality disorder. Tr. at 108-114.

She testified that through therapy, the individual has learned new skills, has taken responsibility for his actions, and is now equipped to cope with trauma and stress. He knows where and how to seek help. She gave as an example that he has coped with the stress of going through the instant hearing by learning to accept uncertainty in his life. She did not believe that there is a risk of bad judgment in this individual if he has another depression event. Tr. at 118-23.

B. The Individual

The individual described the changes he has made in his life since the 2002 break-up with his girlfriend. He indicated that he has reaffirmed his friendships. He knows to seek help and solve problems quickly, rather than let them fester. He identified warning signals that would cause him to seek help: losing communication and experiencing an inability to talk to the persons close to him. He stated that if this occurs, he will seek help quickly. He indicated that in the future if he senses that stress is creating a problem, he will turn to his therapists and friends for help. He gave some examples of instances in which he experienced distress and which caused him to contact his psychologist and his friends for support. He is committed to continuing his therapy as long as it is necessary. Tr. at 149-158.

C. Additional Witnesses

1. Colleague/Friend

This witness has known the individual since 1989. She has a master's degree in social work and in industrial safety management. She has contact with the individual both socially and professionally. She sees the individual about every other week. She was aware of the intense stress that he has been under and stated that he has turned to her for help. She indicated that she has seen the individual learn to step back from a difficult situation, become deliberative, reflective and gain perspective. She believes that he has a good secondary support system. Tr. at 125-132.

2. Friend

This witness has known the individual for 30 years and gets together with him about twice a month. He was aware of the individual's stress and stated that he has given the individual support during difficult times. Tr. at 133-143.

3. Brother

The individual's brother stated that they see each other about once a week and that they provide each other with advice and support. The brother indicated that the individual is involved with his family, and cited in particular the individual's close relationships with his nephews and his father. Tr. at 144-147.

D. Consultant Psychiatrist's Second Round of Testimony

After hearing the testimony from all the above witnesses, the consultant psychiatrist provided a revised diagnosis of this individual. This revision was based on the new, updated information offered by the individual's expert witnesses, the individual's friends and family, and the individual himself.

The consultant psychiatrist noted that a significant period of time had passed since his evaluation: 17 months. He was impressed by the steady course of improvement in this individual. Based on the updated information and his own re-observation of the individual at the hearing, the consultant psychiatrist indicated that the individual's borderline personality traits did not mean that he had the disease. He stated that this earlier diagnosis was not "applicable." Tr. at 161-62.

It was the opinion of the consultant psychiatrist that the individual was not likely to experience a defect in his judgment or reliability. He based his revised diagnosis on the considerable period of time that has elapsed since the evaluation, the manner in which the individual conducted himself at the hearing, his steady relationships with friends and family, and the considerable work the individual has done with his psychologist. Tr. at 159-64.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong

presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

I find that the testimony described above resolves the security concerns related to the individual's mental health and his reliability. As is evident from my discussion of the testimony, the experts are in agreement that the individual suffered from depression, and that it is presently in partial, if not full, remission. Although there the possibility that he may have a depression incident in the future, they are also convinced it will not cause him to have a defect in his judgment or reliability. In this regard, they agree that through his therapy and strong network of healthcare professionals, family and friends, the individual now has the skills and support system he needs to cope with future depression episodes and stress, should they occur. The experts are further of the opinion that the individual does not suffer from borderline personality disorder, even though several years ago he may have exhibited some traits or behaviors consistent with that disease.

Further, the individual convinced me that, through his therapy, he has come to have considerable self awareness. I am persuaded that he will continue his therapy as long as his psychologist believes it is necessary, and that he recognizes the importance of seeking professional help, should his depression symptoms return. In this regard, as noted above, the individual was able to speak specifically about what the symptoms of a depressive episode would be, and recognized the importance of quick action to alleviate them.

Finally, the individual's character witnesses convinced me that he has a strong network of friends and family that he can and does turn to for support.

In view of these factors, I am persuaded that the Criterion H concerns set forth in the Notification Letter regarding the individual's mental health have been resolved.

The Criterion L concern was based on a single event: a violent episode with his girlfriend during which the individual resisted arrest, and was ultimately arrested. I believe that the incident was an anomalous one for the individual, and was associated with the extreme stress of the altercation. I do not think that this type of behavior is likely to occur again. The individual's psychologist did not believe there is a likelihood of more violence by the individual. Tr. at 101. Moreover, as discussed above, I believe that the individual now has the skills necessary to control both his depression and stress, and I therefore believe that any concerns regarding his reliability under stress have also been resolved.

V. CONCLUSION

As the foregoing indicates, the individual has resolved the security concerns under 10 C.F.R. § 710.8 (h) and (l). It is therefore my decision that his suspended access authorization should be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: April 25, 2005